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SUPREME COURT OF THE STATE OF WASHINGTON

SARAH BRADBURN, PEARL CHERRINGTON, CHARLES
HEINLEN, and the SECOND AMENDMENT FOUNDATION,

Plaintiffs,

v.

NORTH CENTRAL REGIONAL LIBRARY DISTRICT,

Defendant.

On Certification from the United States District Court
for the Eastern District of Washington

No. CV-06-327-EFS

The Honorable Edward F. Shea

**BRIEF OF *AMICI CURAE* ELECTRONIC FRONTIER
FOUNDATION AND CENTER FOR DEMOCRACY &
TECHNOLOGY**

Lee Tien 80478
**ELECTRONIC FRONTIER
FOUNDATION**
454 Shotwell Street
San Francisco, CA 94110
Telephone: (415) 436-9333 x 102
Facsimile: (415) 436-9993

Venkat Balasubramani
WSBA No. 28269
BALASUBRAMANI & WEBB
8426 40th Ave SW
Seattle, WA 98136
Telephone: (206) 529-4827
Fax: (206) 260-3966

John B. Morris, Jr. 80479
Cynthia Wong 80480
**CENTER FOR DEMOCRACY &
TECHNOLOGY**
1634 I Street NW #1100
Washington DC, 20006
Telephone: (202) 637-9800
Facsimile: (202) 637-0968

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I. IDENTITY AND INTERESTS OF *AMICI CURIAE*

Amici are non-profit public interest organizations seeking to protect speech, and access to speech, on the Internet.

The Electronic Frontier Foundation (“EFF”) is a member-supported civil liberties organization working to protect free speech and privacy rights in the online world. With more than 13,000 dues-paying members, EFF represents the interests of technology users in both court cases and in broader policy debates surrounding the application of law in the digital age. EFF actively encourages and challenges industry and government to support free expression, privacy, and openness in the information society, and maintains one of the most linked-to Web sites in the world, www.eff.org.

The Center for Democracy & Technology (“CDT”) is a non-profit public interest and Internet policy organization. CDT represents the public’s interest in an open, innovative and decentralized Internet, reflecting constitutional and democratic values of free expression, privacy and individual liberty. CDT has litigated or otherwise participated in a broad range of Internet free speech cases.

II. STATEMENT OF THE CASE AND *AMICI* POSITION

EFF and CDT file this brief as *amici curiae* in support of the plaintiffs for two primary reasons. First, EFF and CDT wish to emphasize

the core First Amendment protections that library users have. Although the focus on this proceeding is appropriately on Washington State law, it arises in a larger context where the Internet has become a primary source of and outlet for speech. This online speech – by both speakers and listeners – is squarely and strongly protected by our First Amendment, and the U.S. Supreme Court has made plainly clear that preventing access to the Internet by adults raises serious constitutional concerns, both generally, and specifically in libraries. In considering the issues certified by the District Court, this Court should be cognizant of this larger constitutional context.

EFF and CDT's second purpose in filing this brief is to bring to the Court's attention the important role that public libraries play in providing Internet access to the public, particularly in rural areas such as the Washington counties comprising the North Central Regional Library District ("NCRL"). In today's world, broadband Internet service has many benefits for users, ranging from the unique opportunity to interact with a global audience to near-instantaneous access to information useful in daily life, whether about health and medical conditions or the latest job listings. Unfortunately, residential broadband Internet access is limited in rural areas: a state-commissioned study of five rural Washington

counties,¹ including one of the counties served by the NCRL (Ferry County), showed that 28% of residents did not have home Internet access, and only 39% of residents had broadband Internet access.² Thus, many rural residents must instead depend on their public libraries for broadband Internet access. Indeed, 82.5% of rural libraries nationwide report that they are the only provider of free public computer and Internet access in their communities.³ As a result, website censorship at NCRL libraries likely has harmed, and if left alone, likely will continue to harm, those served by the NCRL.

Since October 2006, NCRL has used filtering software called the FortiGuard Web Filtering Service. (CP 96, pg. 10 (Order Granting and Denying in Part Def.'s Mot. for Certification and Holding in Abeyance Mot. Summ. J. 10 (Sept. 30, 2008) ("Order")).) The FortiGuard filter

¹ The state legislature ordered the Washington Utilities and Transportation Commission to study the availability and adoption of broadband Internet access in rural Washington. CBG Communications, Inc., Broadband Study Report, June 27, 2008, at 2 (available at <http://www.wutc.wa.gov/webimage.nsf/0/0C107F2AECEC013A8825733800684FCF>) ["WUTC Report"]. The study selected counties "where it was commonly understood that there were service disparities, economic development challenges, and [] other diverse issues that likely contribute to impaired broadband availability, adoption, and use." *Id.* The five rural counties were Columbia, Ferry, Grays Harbor, Lewis, and Stevens. *Id.* at i. Thus, the report provides relevant information not only for Ferry County, but for rural Washington generally.

² WUTC Report, *supra*, at 37-38.

³ Denise Davis et al., *Libraries Connect Communities: Public Library Funding & Technology Access Study 2007-2008* at 28 (Larra Clark, ed.) (available at <http://www.ala.org/ala/aboutala/offices/ors/plftas/0708/LibrariesConnectCommunities.pdf>).

overblocks and underblocks Internet content: while the filter has failed to filter particular sites containing pornographic, sexually explicit, child pornographic or obscene materials at NCRL libraries, the filter has also blocked access to sites that should not be blocked under any reasonable blocking policy. (Order at 14.) Much of this overblocking is produced by the systematic blocking of entire categories of speech. For instance, FortiGuard's "Gambling" category blocks any sources of "gaming information, instruction, and statistics." (Def.'s Opening Br. at 13.) Moreover, NCRL's policy is to block an entire website if any page on that site contains material that it deems inappropriate. (Pls.' Br. at 27-28; CP 41, pg. 11, ¶ 56.) All of these problems are exacerbated by NCRL's refusal to unblock specific websites for adults when NCRL deems the sites' content to be harmful only to minors. (CP 41, pg. 10, ¶ 53 ("NCRL currently blocks access to image search sites such as Google Image Search and Yahoo! Image Search because those sites allow access to images that NCRL believes could be 'harmful to minors'").)

The blocking of websites at NCRL libraries has interfered with Internet use by adult library patrons. Plaintiff Sarah Bradburn tried to research alcohol and drug addiction in connection with academic assignments, but could not access sites providing information about youth tobacco usage. (CP 41, pp. 2-3, ¶¶ 3-5.) Plaintiff Pearl Cherrington was

denied access to an Idaho art gallery website, a site containing health information, and YouTube. (Order at 3.) Plaintiff Charles Heinlen was prevented from accessing images embedded in commercial e-mails sent to his web-based e-mail accounts, several sites categorized as “Nudity and Risque” and “Adult Materials” by NCRL’s FortiGuard filter, and the “personals” section of the website Craigslist.org. (Order at 4-5.) Heinlen was also unable to access www.womenandguns.com, a site maintained by plaintiff Second Amendment Foundation. (Order at 5.)

Because the availability of broadband Internet is limited in many rural areas, public libraries often provide the only Internet access available to people living in such areas. Thus, the filtering at issue may in many cases block access to constitutionally protected speech in the only place where NCRL patrons would be able to access it: their local public library.

III. ARGUMENT

A. Internet Access Through Libraries is Constitutionally Protected

In considering the first significant Internet-focused First Amendment case – challenging the Communications Decency Act in 1996 – the federal trial court described the Internet as “the most participatory form of mass speech yet developed” and “a far more speech-enhancing medium than print, the village green, or the mails.” *ACLU v. Reno*, 929 F. Supp. 824, 882-83 (E.D. Pa. 1996) (Dalzell, J.). On appeal, the U.S.

Supreme Court affirmed the lower court's holding that speech on the Internet should receive the fullest protection of the First Amendment. *See Reno v. ACLU*, 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997).

The U.S. Supreme Court has only considered Internet access in libraries once: in *United States v. American Library Association*, 539 U.S. 194, 123 S. Ct. 2297, 156 L. Ed. 2d 221 (2003), the Court upheld the Children's Internet Protection Act ("CIPA"), which conditioned federal funds on the use by libraries of filtering software. But in upholding CIPA, *all nine justices* indicated that to avoid serious constitutional concerns, it is essential that libraries not prevent adults' access to the full range of constitutionally protected speech online.

The CIPA decision was fractured. Chief Justice Rehnquist wrote for a four-Justice plurality validating CIPA, while Justices Kennedy and Breyer wrote separate concurrences to uphold CIPA. Three Justices (Stevens, Souter and Ginsburg) dissented, and would have struck CIPA down as unconstitutional in its entirety. Of the six Justices who voted to uphold CIPA, the two concurrences were *expressly* contingent on the government's assertion that adult library patrons could easily unblock material and/or have the filtering turned off. Justice Kennedy specifically wrote that the failure to allow adults access to content notwithstanding filtering software "would be the subject for an as-applied challenge." 539

U.S. at 215. Justice Breyer stated that to avoid “the speech-related harm” caused by filters, an adult library patron must be able to “ask a librarian to unblock the specific Web site or, alternatively, ask the librarian, ‘Please disable the entire filter.’” *Id.* at 219. And the four-Justice plurality decision “dispelled” the constitutional argument by relying on the government’s assertion that a “librarian can, in response to a request from a patron, *unblock the filtering mechanism entirely.*” *Id.* at 209 (emphasis added).

Thus, all nine Justices in the CIPA decision either believed that library filtering was unconstitutional, or that the constitutional problems could be avoided *if* adult library patrons *in fact* could get access to the full range of constitutionally protected speech on the Internet. This essentially unanimous conclusion of the U.S. Supreme Court – that adults’ access to lawful speech online should not be abridged in libraries – reflects an appreciation of the dual facts that the Internet is a vital medium for speech today, and that the library remains a vital avenue for that speech. It is in this larger context that this Court should consider the important questions of Washington State law, and the crucial importance – as discussed more fully below – of rural libraries to the ability of Washington citizens to access constitutionally protected speech online.

B. Broadband Internet is Crucial to Rural Areas

“In a very short period of time, the Internet has evolved from being a luxury or entertainment item to an essential type of infrastructure for business, health care, education and government.” Brian Dabson & Jennifer Keller, *Rural Broadband: A RUPRI Policy Brief*, Dec. 8, 2008 at 3 (available at <http://www.rupri.org/Forms/RuralBroadbandFinal.pdf>).

For example, the Internet has become a crucial resource for our democracy; the 2008 presidential election marked the first time that more than half the American voting-age population went online to keep abreast of and participate in the campaign. Aaron Smith, Research Specialist, Pew Internet & American Life Project, *The Internet's Role in Campaign 2008* at 3 (April 2009) (available at <http://www.pewinternet.org/Reports/2009/6--The-Internets-Role-in-Campaign-2008.aspx>).

Rural Internet users in Washington use the Internet to keep in touch with family and friends, to research products and prices (and shop), share photos, and to find medical information. WUTC Report, *supra*, at 33. Not all Internet access is the same, however. As the WUTC Report also noted, most rural Washingtonians – if they have Internet access at all – access the Internet through a “dial-up” connection over a phone line (56 kilobits per second). *Id.* at 38. Broadband Internet access offers key

advantages: it is much faster than dial-up (at least 200 kilobits per second, and more typically from 768 kilobits - 1.5 megabits per second)⁴ and does not require a phone call – of major importance for homes with only one phone line. As the Federal Communications Commission explains:

Broadband provides access to the highest quality Internet services—streaming media, VoIP (Internet phone), gaming, and interactive services. Many of these current and newly developing services require the transfer of large amounts of data which may not be technically feasible with dial-up service. Therefore, broadband service may be increasingly necessary to access the full range of services and opportunities that the Internet can offer.

Federal Communications Commission (FCC), *What is Broadband?*

(available at <http://www.fcc.gov/cgb/broadband.html>).

Indeed, the President's own website, www.whitehouse.gov, uses YouTube and other multimedia websites to communicate with the American people. YouTube exemplifies the kind of complex and data-rich application that requires high-speed Internet access for an unimpaired user experience. *Rural Broadband: A RUPRI Policy Brief, supra*, at 3; Video Player Issues: Watching videos on dial-up, YouTube Help Center, <http://www.google.com/support/youtube/bin/answer.py?hl=en&answer=74663>.

The WUTC Report made clear that broadband access greatly

⁴ WUTC Report, at i.

increases the value of the Internet to rural Washingtonians. “Households with higher speeds [of Internet access] were significantly more likely to: visit government websites, shop online, perform language translation, watch videos, search for school information, bank online, share photos, get local news, take a class online, research online, play video games, find medical information and keep in touch with family and friends.” WUTC Report, *supra*, at 44. National statistics echo this finding: compared with dial-up users, broadband users “use the Internet more for news, work, entertainment, and group participation, so broadband access might improve social and economic conditions beyond levels achievable with basic Internet access.” Robert LaRose et al., *Closing the Rural Broadband Gap*, Nov. 30, 2008 at 6-7 (available at <http://www.knightcenter.org/FileUploads/Stimulus/Closing%20the%20Rural%20Broadband%20Gap.pdf>).

Broadband Internet access in rural areas benefits more than individuals; it allows rural areas to participate in the global information economy and retain population through the expanded economic and social opportunities that Internet access affords. Noted benefits include “online access to customers and potential employees” for rural businesses and “online access to goods and services that are not readily available in [rural] communities” for rural consumers. *Rural Broadband: A RUPRI*

Policy Brief, supra, at 3.

The benefits of broadband access are particularly great in the employment arena. “For every one percentage point increase in broadband penetration in a state, employment is projected to increase by 0.2 to 0.3 percent per year.” Robert Crandall, William Lehr & Robert Litan, *The Effects of Broadband Deployment on Output and Employment: A Cross-sectional Analysis of U.S. Data*, 6 Issues in Economic Policy, The Brookings Institution, Jul. 2007 at 2 (available at http://www.brookings.edu/~media/Files/rc/papers/2007/06labor_crandall/06labor_crandall.pdf). In a survey asking libraries about which public access Internet services were most critical to the communities they serve, 60.9% of rural libraries indicated “provid[ing] services for job seekers” as a critical service. *Libraries Connect Communities, supra*, at 25-28.

Thus, libraries play a key role in providing access to employment opportunities through the provision of public Internet access. Yet the FortiGuard filter used by NCRL to filter Internet access at public library terminals blocked a website for the Kalispel tribe, which a patron researching job opportunities attempted to access, under the “Gambling” category. (CP 71, pg. 17.) Although NCRL unblocked access to the tribe’s website at the patron’s request, patrons who do not take the step of asking for a site to be unblocked lose a key benefit of public library

Internet access as a job-seeking tool.⁵

C. Home Broadband Access is Limited in Rural Areas in Washington and Across the U.S.

Despite the importance of broadband access, availability and adoption of broadband remain limited in rural areas. A 2008 survey conducted by the Pew Internet & American Life Project indicated that 38% of rural adults have broadband Internet access at home compared with 57% of urban adults and 60% of suburban adults. John B. Horrigan, *Home Broadband Adoption 2008*, July 2008, at 3 (available at <http://www.pewInternet.org/Reports/2008/Home-Broadband-2008.aspx>).

Among those who access the Internet via dial-up in rural America, 15% cite lack of availability as a reason for not using broadband. *Id.* at iii, 12.

For residents served by the NCRL,⁶ broadband availability is even more limited than in the rural United States generally. The prime example is Ferry County, where it is estimated that 65% of residents either have no

⁵ As a practical matter, NCRL's processing of unblocking requests can severely hinder job-seekers. Even under NCRL's new "automated" unblocking system, less than one-third of the 90 requests were responded to on the same day, and some were delayed by more than three days. (CP 57, pg. 7, ¶ 13.)

⁶ The NCRL is a rural library district established by the citizens of five Washington counties: Chelan, Douglas, Ferry, Grant, and Okanogan. Order at 6. The state legislature defines a "rural county" as a "county with a population density less than 100 persons per square mile." Population Density and Land Area Criteria Used for Rural Area Assistance and Other Programs, Annual July Update, Office of Financial Management, State of Washington, <http://www.ofm.wa.gov/popden/rural.asp>. On the basis of population density, the counties in NCRL are among the smallest in Washington. *Id.* Each county

home Internet access (30%) or use dial-up (35%). WUTC Report, *supra*, Attachment 1, at 2. Ferry County was one of five counties studied in the Washington Utilities and Transportation Commission's broadband report. See WUTC Report, at i. Because the report studied rural counties, its findings are relevant for rural Washington generally.

A survey conducted during April and May 2008 of residents of the five counties involved in the WUTC Report determined that 72% of households had home Internet access, but only 32% had wireline broadband service, that is, Internet access via DSL or a cable modem. *Id.* at 38. In Ferry County, only 15% of households have wireline broadband service – in stark contrast to the national average of 54%. *Id.* at iv. The report estimated that a mere 25% of Ferry County residents could receive broadband service if they desired it, noting that Ferry County “has a significant geographic area of the county that cannot obtain broadband services.” *Id.* at 143-144. The report cited limited availability of broadband service, relatively high cost of service, and lack of viable, multiple competing options as key inhibitors to broadband adoption and use in the five counties. *Id.* at 193-194. Indeed, the NCRL library examined in the WUTC Report, the Republic Community Library,

has a population density of fewer than 32 persons per square mile, and Ferry, with 3.49 persons per square mile, is the state's least densely populated county. *Id.*

indicated that the broadband marketplace in Republic “is not competitive at all with only one provider option.” *Id.* at 108.

Of the counties that make up NCRL, both Ferry and Okanogan have zip codes in which fewer than four holding companies reported high-speed Internet access to at least one customer in the zip code, according to data from broadband providers collected by the FCC through Form 477 filings.⁷ FCC, *Number of Holding Companies Reporting High-Speed Subscribers by Zip Code as of December 31, 2007* (available at <http://www.fcc.gov/wcb/iatd/comp.html> under “Zip Codes by Number of High-Speed Service Providers”). While FCC data indicates that more than 99% of U.S. zip codes have at least one broadband provider that serves at least one end user, the reporting system used by the FCC “allows a single business subscription to count for broadband ‘availability’ across a zip code of any size; [thus] there is no way of knowing from FCC data how

⁷ Congress directed the FCC and the states to encourage deployment of advanced telecommunications capability in the United States on a reasonable and timely basis. *See* §706, Pub. L. 104-104, Title VII, Feb. 8, 1996, 110 Stat. 153, reproduced in the notes under 47 U.S.C. § 157. As part of that effort, facilities-based broadband providers report the number of high-speed connections in service pursuant to the FCC’s local telephone competition and broadband data gathering program using FCC Form 477. For reporting purposes, an entity is a “facilities-based” provider of high-speed connections if it owns the portion of the physical “local loop” or other facility that terminates at the end user location, if it obtains unbundled network elements (UNEs), special access lines, and other leased facilities that terminate at end user locations and equips them to operate as high-speed connections, or if it uses spectrum on a licensed or unlicensed basis to terminate high-speed connections at end user locations. Because facilities-based providers often

many households and businesses actually have broadband available to them.” *Rural Broadband: A RUPRI Policy Brief*, *supra*, at 5. Strong competition among providers of broadband providers is needed for lower prices and greater adoption. *The Effects of Broadband Deployment on Output and Employment*, *supra*, at 15.

Plaintiff adult library patrons who were thwarted in their attempts to receive constitutionally protected content when they accessed the Internet using public computers at NRCL library facilities all lacked access to broadband Internet service in their homes. Plaintiff Bradburn testified that she does not have Internet access at her home. (CP 41, pg. 2, ¶ 3.) Plaintiff Cherrington also does not have Internet access at home, although she has Internet access at her husband’s office. *Id.* at 3, ¶ 6. Plaintiff Heinlen has only sporadic Internet access outside of the library. *Id.* at 3, ¶ 10. Thus, the plaintiffs in this case are illustrative of the limited broadband adoption by rural residents and resulting dependence on the library for broadband Internet access.

D. Because Rural Residents Lack Home Access to Broadband Internet, Libraries are a Critical Source of Broadband Access

For rural Washingtonians, libraries are “a key location for those without Internet access at home to use a broadband connection. Visiting

operate in many states through a variety of agents and affiliates at the retail level, the

the library to use the Internet was reported by 74% of those without home Internet service.” WUTC Report, *supra*, at 25. More generally, the 2007-2008 *Public Libraries and the Internet Survey*, which sampled 6,984 public libraries as part of the *Public Library Funding Technology Access Study* funded by the American Library Association and the Bill and Melinda Gates Foundation, found that 72.5% of library branches generally and 82.5% of rural libraries report that they are the only provider of free public computer and Internet access in their communities. *Libraries Connect Communities*, *supra*, at 25-28.

NCRL also recognizes the importance of broadband access to its patrons. The WUTC Report surveyed library districts serving the counties studied “to determine how the districts currently use broadband network infrastructure and services and what impact broadband has on the operations of the district within the respective counties.” WUTC Report, *supra*, at 104. NCRL provided information regarding its only branch in Ferry County, the Republic Community Library: “NCRL cites a robust broadband connection as very important to its day to day library operations, especially related to the ability for the community to do research” *Id.* at 107-108.

parent or holding company typically files Form 477 on behalf of all their retail entities.

E. The NCRL Filtering Policy Fails to Meet Constitutional Standards

As detailed above, broadband Internet access is vital to the lives of the citizens of Washington State, and as made clear in *Reno v. ACLU*, 521 U.S. 844 (1997), and *United States v. American Library Association*, 539 U.S. 194 (2003), governmental restrictions on what content adults can access violate the U.S. Constitution. The constitutional minimum requires that adults be able to have filtering software disabled to allow them to access lawful content.

This constitutional minimum is necessary, among other reasons, because of the inherently imprecise nature of filtering software. As the expert witnesses in this case made clear – and as courts have found elsewhere, *see ACLU v. Gonzales*, 478 F. Supp.2d 775, 794 (E.D. Pa. 2007) (Finding of Fact 100) – filtering technology can both “underblock” and “overblock,” such that the more strict the filtering is (to exclude undesired sites) the more overbroad it is (also excluding completely appropriate sites). It is clear from the expert reports in this case, *see, e.g.*, (CP 41-5, at 4-7) (B. Haselton, Report on Accuracy Rate of Fortiguard Filter (July 27, 2007)), that the filter used by NCRL indeed “overblocks” and excludes completely lawful, appropriate sites.

Beyond the overblocking – denying citizens access to sites that

NCRL may not even intend to block – much of the content that the NCRL *does* intend to block is itself fully protected, appropriate, and important for adults to be able to access. Thus, both when filters fail to work well (and thus overblock), *and* when they do work as intended, adults are denied access to protected content.

The First Amendment requires that adults be able to have the filters disabled or promptly have blocked sites unblocked. The NCRL fails to meet this requirement. Although the NCRL does at times (and often only after very significant delay) unblock some sites, it refuses to unblock other constitutionally protected sites. This governmental decision to continue to block access to protected sites does not address the constitutional expectations set out by all nine Justices in *United States v. American Library Association*.

Moreover, the need for adults in *rural* communities to be able to have the filters disabled – or at a minimum, to have prompt, anonymous unblocking of sites – is especially critical. Such communities often have few, if any, alternative sources of sometimes sensitive or controversial information (about, as two of many examples, birth control and AIDS) that is lawful, and available, on the Internet. If a citizen is unable to access content at the library, there may simply be no other effective and inexpensive way for a citizen to access the desired information. Although

enforcement of constitutional rights is vital in any circumstance, in rural Washington State, these rights are particularly important.

IV. CONCLUSION

The harm caused by Internet censorship in NCRL libraries is exacerbated by the lack of options NCRL patrons have for obtaining broadband Internet service elsewhere – or for obtaining access to the lawful information blocked by NCRL’s filters. The plaintiffs in this case, as is likely true for a substantial number of NCRL patrons, do not have access to broadband Internet in their homes. Internet access provides access to tools rural Washingtonians can use for engaging socially and economically with one another and the wider world, in addition to facilitating research NCRL patrons wish to carry out for personal and academic purposes. When the local public library provides the only option for accessing these tools, as is often the case in the rural areas served by NCRL, website censorship – under both the First Amendment and Washington State law – takes on heightened significance. As one NCRL user wrote:

Not sure I understand why [Google Image Search] is blocked. People who want to find pictures of ‘inappropriate’ things can find them without the image search. . . . Please don’t make life more difficult for the 99.5% of people using the library resources in an acceptable manner (for instance, using the image search to study for anatomy and physiology).

(CP 53, pg. 8.)

Respectfully submitted, and dated May 22, 2009.

Lee Tien
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
San Francisco, CA 94110
Telephone: (415) 436-9333 x 102
Fax: (415) 436-9993

John B. Morris, Jr.
Cynthia Wong
**CENTER FOR DEMOCRACY &
TECHNOLOGY**
1634 I Street NW #1100
Washington DC, 20006
Telephone: (202) 637-9800
Fax: (202) 637-0968

/s/ Venkat Balasubramani

Venkat Balasubramani, WSBA 28269
BALASUBRAMANI & WEBB
8426 40th Ave SW
Seattle, WA 98136
Fax: (206) 260-3966

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CERTIFICATE OF SERVICE

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I certify that I caused the foregoing (1) **MOTION FOR LEAVE TO FILE** along with (2) **THE BRIEF OF AMICI CURAE OF THE ELECTRONIC FRONTIER FOUNDATION AND CENTER FOR DEMOCRACY & TECHNOLOGY** to be filed via email with the Court, and for the same to be served via email on all parties (all of whom consented to receive service via email):

Counsel for Defendant North Central Regional Library District

Thomas D. Adams, WSBA # 18470 (tadams@karrtuttle.com)
Celeste M. Munroe, WSBA #35843 (cmonroe@karrtuttle.com)
Karr Tuttle Campbell, P.S.C.
1201 3rd Avenue
Pioneer Tower, Suite 650
Seattle, Washington 98101

Counsel for Plaintiffs, Sarah Bradburn, et al.

Savitt & Bruce LLP Duncan Manville dmanville@jetcitylaw.com 1325 Fourth Ave, Ste. 1410 Seattle, WA 98101-2509	Aaron Caplan aaron.caplan@lls.edu Loyola Law School Los Angeles 919 Albany St. Los Angeles, CA 90015
Catherine Crump ccrump@aclu.org American Civil Liberties Union Foundation 125 Broad Street, 17th Floor New York, NY 10004	Harry Williams IV hwilliams@aclu-wa.org American Civil Liberties Union of Washington Foundation 705 Second Ave., Suite 300 Seattle, WA 98103

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct and that this declaration was executed on May 22, 2009, at Seattle, Washington.

/s/ Venkat Balasubramani
Venkat Balasubramani

OFFICE RECEPTIONIST, CLERK

To: Venkat Balasubramani
Cc: 'Lee Tien'; 'Cynthia Wong'; 'John Morris'; 'Aaron Caplan'; tadams@karrtuttle.com; cmonroe@karrtuttle.com; dmanville@jetcitylaw.com; hwilliams@aclu-wa.org; ccrump@aclu.org
Subject: RE: Bradburn, et al. v. North Central Regional Library District (Case No. No. 82200-0)

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Subject: Bradburn, et al. v. North Central Regional Library District (Case No. No. 82200-0)

Please find attached for filing (1) a Motion for Leave to file as amici and (2) an amicus brief in the above case. All parties have consented to service via email and are being copied on this message.

Thank you, and if you have any questions feel free to call or email.

Regards,

venkat

Venkat Balasubramani (WSBA # 28269)

Balasubramani & Webb
<http://www.balasubramani.com>

8426 40th Ave SW
Seattle, WA 98136
tel: 206-529-4827
fax: 206-260-3966
venkat@balasubramani.com